

1 Alex R. Straus (SBN 321366)
2 **MILBERG COLEMAN BRYSON**
3 **PHILLIPS GROSSMAN, PLLC**
4 280 S. Beverly Drive, PH Suite
5 Los Angeles, CA 90212
6 Telephone: (866) 252-0878
7 Facsimile: (865) 522-0049
8 astraus@milberg.com

9 *Attorney for Proposed Intervenors*
10 *Vivian Gonczi, Howard Packer,*
11 *and Lance Alligood*

12
13 **UNITED STATES DISTRICT COURT**
14
15 **NORTHERN DISTRICT OF CALIFORNIA**
16
17 **SAN FRANCISCO DIVISION**

18 IN RE: 23ANDME, INC. CUSTOMER) Case No.: 3:24-md-03098-EMC
19 DATA SECURITY BREACH LITIGATION)
20) **NOTICE OF CORRECTED¹ MOTION**
21) **AND MOTION TO INTERVENE;**
22) **MEMORANDUM IN SUPPORT**
23)
24) Judge: Hon. Edward M. Chen
25) Courtroom: 5, 17th Floor
26) Hearing Date: October 17, 2024
27) Hearing Time: 1:30 p.m.
28)

NOTICE OF CORRECTED MOTION AND MOTION TO INTERVENE

29 To the Clerk of Court and all interested parties:

30 PLEASE TAKE NOTICE that on October 17, 2024, at 1:30 p.m., or on such other date
31 or time as this matter may be heard, in the courtroom of the Honorable Judge Edward M. Chen,

32 ¹ Proposed Intervenors and their Counsel file this “Corrected Motion” in the interest of full
33 transparency (*see infra* at 9) and to correct certain statements made in their original motion and
34 supporting papers after meeting and conferring with Class Counsel.

1 located at 450 Golden Gate Avenue, 17th Floor, Courtroom 5, San Francisco, California 94102,
2 Intervenors Vivian Gonczi, Howard Packer, and Lance Alligood (collectively, "Intervenors")
3 will and hereby do, move for an order allowing intervention under Federal Rule of Civil
4 Procedure Rule 24(a) as a matter of right or, in the alternative, under Rule 24(b) for permissive
5 intervention, for the purpose of opposing the proposed class settlement before the Court.

6 This Motion is made to protect the rights of claimants actively pursuing individual
7 arbitrations against 23andMe pursuant to a contract, specifically 23andMe's own Terms of
8 Service, which require individual arbitration as the exclusive means by which to resolve any and
9 all disputes with the company. The proposed Intervenors are among approximately 4,966
10 claimants who are represented by the undersigned counsel and who previously provided notices
11 to 23andMe of their respective individual claims and have initiated their individual arbitrations
12 against the company regarding the compromise of their genetic data via the 23andMe data breach
13 at issue before this Court (collectively, "Claimants"). These Claimants have ongoing arbitration
14 proceedings based on specific damages arising from the exposure of their highly sensitive genetic
15 information by 23andMe. The class settlement, as currently proposed, requests extraordinary and
16 unprecedented relief in the form of an injunction of thousands of pending arbitrations, which
17 would effectively extinguish Intervenors and Claimants' private contractual rights to pursue
18 arbitration where these Claimants seek different relief than that afforded under the Class
19 Settlement for the distinct and long-lasting harms they have suffered and will continue to suffer
20 because of 23andMe's data breach. The Motion will be heard on this Notice of Motion and
21 Memorandum in Support below, as well as other filings and arguments that may be submitted
22 and the Proposed Order filed herewith.

1 Dated: October 1, 2024

Respectfully submitted,

2 /s/ *Alex R. Straus*

3 Alex R. Straus (SBN 321366)
4 **MILBERG COLEMAN BRYSON**
5 **PHILLIPS GROSSMAN, PLLC**
6 280 S. Beverly Drive, Penthouse
7 Beverly Hills, CA 90210
8 Telephone: (866) 252-0878
9 Facsimile: (865) 522-0049
10 astraus@milberg.com

11 *Attorney for Proposed Intervenors Vivian Gonczi,*
12 *Howard Packer, and Lance Alligood*

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MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

This Motion to Intervene is filed on behalf of Intervenors Vivian Gonczi, Howard Packer, and Lance Alligood, who are among approximately 5,000 Claimants represented by the undersigned counsel and who are currently engaged in arbitration proceedings against 23andMe pending before JAMS. Intervenors and similarly situated Claimants were directly affected by the April 2023 data breach caused by 23andMe's inadequate data security policies and practices, which allowed unidentified third parties to download and sell extraordinarily sensitive personally identifiable information about their genomics, DNA profiles, ancestries and ethnicities on the Dark Web. The data of nearly one million 23andMe users with alleged Jewish ancestry, including their home addresses, was sold by cyber criminals on hacking platforms.² The exposure of this data, is particularly dangerous given the current volatile political climate, including the war in the Middle East.³

Intervenors assert that the proposed class action settlement seeks extraordinary and unprecedented relief. It seeks to strip away contractual rights between private parties to the benefit of 23andMe and detriment of the Claimants and Class Members. At the time they signed up for 23andMe's services, 23andMe forced these Claimants and Class Members to surrender their rights to sue in court over any and all disputes and controversies and instead required them to pursue their claims through private arbitration proceedings. When 23andMe instituted this

² Oldfield, Ariella, *23andMe faces lawsuit as hackers sell information on users with Jewish heritage*, THE TIMES OF ISRAEL, Jan. 31, 2024, available at <https://www.timesofisrael.com/23andme-faces-lawsuit-as-hackers-sell-information-on-users-with-jewish-heritage/> (last accessed Sept. 25, 2024).

³ Antisemitic incidents increased by 36% in the United States in 2022 with more than 3,500 incidents, many of which were assaults targeting Jewish people. Sganga, Nicole, *Highest number of antisemitic incidents since 1979 recorded last year, Anti-Defamation League finds*, CBS NEWS, Mar. 23, 2023, available at <https://www.cbsnews.com/news/antisemitic-incidents-most-since-1979-anti-defamation-league-annual-report/> (last accessed Sept. 25, 2024).

1 adhesive contract and arbitration requirement, it hoped it would be immune from lawsuits and
2 liability, fully believing no consumer would ever waste their time or money to actually go through
3 the arbitration process. 23andMe was wrong. In the wake of the data breach, thousands of
4 Claimants sought to enforce their rights through 23andMe's own arbitration process. Faced with
5 the reality that 23andMe's own arbitration process no longer benefitted 23andMe, 23andMe now
6 seeks to avoid the very dispute resolution process it created. Essentially, 23andMe seeks to play
7 a game of "heads I win, tails you lose." In other words, if 23andMe thought it could avoid
8 liability through the arbitration process, there is no doubt 23andMe would seek to invoke that
9 arbitration clause to kill a lawsuit. But now that the arbitration clause no longer serves to benefit
10 23andMe, it has completely disavowed that clause and rushed to reach a class wide settlement
11 that could impair the contractual rights of Claimants and Class Members. The proposed
12 settlement before the Court threatens to enjoin class members, including Intervenors and
13 Claimants, from pursuing ongoing private arbitrations unless and until they affirmatively opt out
14 within a narrow timeframe set by the settlement. There is no basis to enjoin these ongoing
15 arbitrations. Moreover, the opt-out provisions, as outlined in paragraphs 73(h) and 80-88 of the
16 Settlement Agreement, unfairly burden Claimants by requiring strict compliance with a
17 convoluted opt-out process clearly geared towards making it difficult for Claimants and Class
18 Members to opt out and pursue individual arbitration. Furthermore, Claimants seek relief that
19 different than the relief being afforded under the proposed settlement, including, for example,
20 the incorporation of logging and monitoring programs and requiring annual SOC 2 Type 2
21 assessments to ensure long-term protection and independent oversight of 23andMe's data
22 security practices.

23
24 This Motion is brought under Federal Rule of Civil Procedure 24(a) for intervention as a
25 matter of right, as Intervenors and Claimants have a protectable interest that will be impaired if
26 the proposed class settlement is approved without their participation. Alternatively, Intervenors
27 seek permissive intervention under Rule 24(b), as their claims share common legal and factual
28

1 questions with the class action yet focus on the improperly requested injunction of their
 2 individual arbitrations through which they seek different relief to address the unique harm caused
 3 by the genetic data breach. Pursuant to this Motion, Intervenors seek leave to file the Opposition
 4 to Proposed Injunction and Opt-Out Procedures Sought by Plaintiffs' Motion for Preliminary
 5 Approval of Class Action Settlement, attached hereto as Exhibit A.

6 **STATEMENT OF RELEVANT FACTS**

7 **A. Status of the Class Action Litigation**

8 In October 2023, 23andMe publicly disclosed that a significant data breach occurred,
 9 compromising millions of users' personal and genetic data. Following this announcement,
 10 over forty (40) class action lawsuits were filed, all alleging that 23andMe failed to adequately
 11 protect user data and violated various consumer protection laws. These lawsuits were
 12 consolidated into a Multidistrict Litigation (MDL) in the Northern District of California,
 13 overseen by the Honorable Edward M. Chen. On September 12, 2024, the MDL parties reached
 14 a proposed settlement which includes a \$30 million fund to compensate affected users. While the
 15 proposed settlement provides for general monetary compensation, which Intervenors do not take
 16 issue with, it requests extraordinary and unprecedented relief by asking this Court to strip away
 17 contractual rights between private parties by way of an injunction of thousands of pending private
 18 arbitrations. Specifically, ¶ 73.h) of the proposed settlement agreement requests:

19
 20 “preliminary injunction of all Settlement Class Members and their
 21 representatives from filing, commencing, prosecuting, maintaining,
 22 intervening in, conducting, continuing, or participating in any other
 23 lawsuit or administrative, regulatory, arbitration or other proceeding
 based on the Released Claims, unless and until they personally
 submit a timely request for individual exclusion pursuant to the
 Settlement Agreement after receiving Notice.”

24 Plaintiff's Proposed Settlement, ECF No. 103-2, ¶ 73(h). Further, Intervenors intend to seek
 25 different non-monetary relief than that provided under the Settlement to address the long-term
 26
 27
 28

1 consequences associated with the exposure of genetic data, a central issue for Intervenors and
 2 Claimants.

3 Notably, the request for a preliminary injunction has drawn the attention of the Court,
 4 prompting the Honorable Judge Chen to question of whether “either party discussed this
 5 requested preliminary injunction with the attorneys representing the plaintiffs in the state court
 6 cases or the claimants in the arbitration proceedings?” Order Re Supp. Briefing and/or Evidence,
 7 ECF No. 111, ¶ P. Intervenors and Claimants submit this Motion to advise the Court they
 8 unequivocally oppose the requested preliminary injunction.

9 **B. Milberg’s Role in the Class Action Proceedings**

10 The undersigned law firm (Milberg Coleman Bryson Phillips Grossman PLLC
 11 (“Milberg”)) filed four (4) class action complaints as local counsel for other law firms related to
 12 the 23andMe data incident that were ultimately consolidated as part of these MDL proceedings.
 13 *See J.S. et al. v. 23andMe, Inc.*, No. 23-cv-05234, ECF No. 1 (filed 10.12.2023), *Greenberg v.*
 14 *23andMe, Inc.*, No. 23-cv-5302, ECF No. 1 (filed 10.17.2023); *Hoffffman et al. v. 23andMe, Inc.*,
 15 No. 23-cv-05332, ECF No. 1 (filed 10.19.2023); *Dube v. 23andMe, Inc.*, No. 23-cv-5768, ECF
 16 No. 1 (filed 11.9.2023). Specifically, Milberg associate John J. Nelson—one of approximately
 17 120 lawyers at the firm—served in a purely local counsel capacity in these proceedings for
 18 various out of state law firms. Several of these clients for which Milberg served as local counsel
 19 ultimately approved the settlement before the Court. Mr. Nelson may have received emails from
 20 Class Counsel about the proposed settlement, including the terms now complained of (i.e., the
 21 injunction and opt out provisions) but he was not substantively involved in the settlement
 22 discussions and did not advise any of the Plaintiffs to approve the settlement. Mr. Nelson has
 23 now withdrawn from his limited role as local counsel in these proceedings. Milberg files this
 24 corrected Motion in the interest of transparency, so the Court is aware that Milberg had a limited
 25 role in the class action proceedings.

While Class Counsel and/or 23andMe may contend the Milberg law firm tacitly “signed off” on the proposed settlement and its terms by serving as local counsel in the proceedings and not previously voicing an objection to the proposed settlement, Milberg respectfully disagrees with this contention given its limited role in the proceedings. In any event, and as the Court knows, the Court has an independent obligation under Rule 23 to review whether the proposed terms are fair and reasonable.

C. Status of the Mass Arbitration Proceedings

Beginning in December 2023, the undersigned counsel sent 23andMe notices of dispute on behalf of thousands of Claimants regarding its April 2023 data breach. And in February 2024, one hundred (100) Claimants filed individual demands for arbitration of their claims with JAMS in accord with 23andMe's governing Terms of Service. Claimants and 23andMe paid their respective filing fees, which amounted to hundreds of thousands of dollars, to JAMS and confirmed their readiness to proceed. JAMS is currently in the process of assigning arbitrators to preside over these individual matters. The next step will be for those arbitrators to schedule preliminary hearings and enter scheduling orders. Notices of dispute were sent to 23andMe on behalf of thousands of additional Claimants throughout April and May 2024. In July 2024, an additional 4,866 Claimants submitted individual demands for arbitration of their claims to JAMS where they remain pending.

Intervenors and Claimants' claims seek relief for 23andMe's negligence in safeguarding their highly sensitive personal and genetic data, and the long-term risks occasioned by the breach, including potential misuse of genetic information and future discrimination. Significantly, the specific relief requested by Intervenors and Claimants in their demands is different than the remedies included in the proposed class action settlement. Claimants intend to seek significantly more money through the arbitration proceedings than they will likely recover by simply participating as absent class members in this Settlement. Moreover, they also seek different non-monetary relief than that provided for under the Settlement, including, for example, logging and

1 monitoring programs, ongoing independent oversight through annual SOC 2 Type 2 assessments,
2 and additional data security protocols to ensure continuous protection of genetic data. Claimants
3 seek these remedies to address the unique harm caused by exposure of their genetic information.

4 **D. The Settlement and the Burdensome Opt-Out Process**

5 The proposed class settlement improperly includes a preliminary injunction provision
6 which, if approved, would enjoin *all* class members—including Intervenors and Claimants who
7 are currently pursuing arbitration—from filing, commencing, or participating in any arbitration
8 or related proceedings unless they submit a timely request for exclusion. This injunction would
9 effectively bar Intervenors and Claimants from continuing to pursue their claims in arbitration
10 unless and until they go through the onerous opt-out procedure proposed under the class
11 settlement. Plaintiff's Proposed Settlement, ECF No. 103-2, ¶ 73(h). The proposed opt-out
12 procedures unreasonably require any class members wanting to opt out of the class to submit a
13 written request that must:

- 15 • Include the case name of the Litigation: In Re: 23andMe, Inc.,
16 Customer Data Security Breach Litigation, Case No. 24-md-03098-
EMC;
- 17 • Identify the name and current email and mailing addresses of the
18 Person seeking exclusion from the Settlement;
- 19 • Identify the 23andMe username or email associated with the
20 23andMe account for the Person seeking exclusion from the
21 Settlement;
- 22 • Be individually signed by the Person seeking exclusion using wet-
23 ink signature, DocuSign, or other similar process for transmitting
24 authenticated digital signatures;
- 25 • Include an attestation clearly indicating the Person's intent (to be
determined by the Notice and Claims Administrator) to be excluded
from the Settlement;
- 26 • Attest that the Person seeking exclusion had a 23andMe user
27 account as of August 11, 2023.

1 Plaintiff's Proposed Settlement, ECF No. 103-2, ¶ 81. Even opt-out requests submitted
 2 electronically via the claims portal require jumping through an additional hoop by verifying the
 3 request within three business days of the Opt-Out Deadline, which is clearly intended to void
 4 otherwise valid opt-out requests. *Id.* at ¶ 82.

5 Significantly, the proposed opt-out procedures do not allow for the undersigned counsel
 6 to opt their own clients (i.e., Intervenors and Claimants) out of the class en masse or otherwise,
 7 despite the fact that Intervenors and Claimants are represented by counsel and, as 23andMe has
 8 full knowledge, have expressed their intent to continue their individual arbitrations. Indeed, the
 9 settlement agreement expressly states that any such requests seeking exclusion on behalf of more
 10 than one individual shall be deemed invalid. *Id.* at ¶ 83.

11 Additionally, as discussed above, Intervenors and Claimants intend to seek monetary and
 12 non-monetary remedies that are different than the remedies provided for under the proposed class
 13 settlement. This fact also militates in favor of preserving the arbitration claimants' ability to
 14 pursue the specifically tailored relief sought in the ongoing arbitration proceedings.

15 **ARGUMENT**

16 **A. The Proposed Intervenors Satisfy the Requirements of Rule 24(a) and Should
 17 Be Allowed to Intervene as a Matter of Right.**

18 A court must allow intervention to anyone who "claims an interest relating to the property
 19 or transaction that is the subject of the action and is so situated that disposing of the action may
 20 as a practical matter impair or impede the movant's ability to protect its interest, unless existing
 21 parties adequately represent that interest." Fed. R. Civ. P. 24(a). In order to intervene as a matter
 22 of right, a prospective intervenor must show: (1) the motion is timely, (2) the applicant has a
 23 significantly protectable interest relating to the property or transaction that is the subject of the
 24 action, (3) the disposition of the action may impair or impede the applicant's ability to protect
 25 that interest, and (4) the existing parties do not adequately represent the applicant's interest.

26 *United States v. Oregon*, 839 F.2d 635, 637 (9th Cir. 1988). Courts interpret the requirements for

1 intervention broadly, favoring intervention where possible. *Prete v. Bradbury*, 438 F.3d 949, 954
 2 (9th Cir. 2006) (internal quotation marks omitted).

3 **1. The Application to Intervene Is Timely**

4 Timeliness is the “threshold requirement” for a party seeking to intervene under Rule
 5 24(a). *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990). Three factors determine
 6 whether a motion is timely: “(1) the stage of the proceeding at which an applicant seeks to
 7 intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.”
 8 *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986). Here, the proposed
 9 settlement has only now reached the stage where the MDL parties have agreed on terms, and the
 10 plaintiffs having moved this Court for conditional certification of the settlement class and
 11 preliminary approval. ECF No. 103-1. The Motion to Intervene, therefore, is at this point timely
 12 and appropriate. Courts routinely find intervention in response to a proposed settlement to be
 13 timely when intervenors act promptly upon learning a proposed settlement may adversely affect
 14 their interests. *E.g., Glass v. UBS Fin. Servs., Inc.*, No. 06-4068, 2007 WL 474936, at *3 (N.D.
 15 Cal. Jan. 17, 2007), *aff’d*, 331 F. App’x 452 (9th Cir. 2009). Timeliness is generally measured
 16 from the point when the proposed intervenor receives notice the settlement terms may be contrary
 17 to their interests, not from the beginning of the litigation. *Id.*

19 In this case, Intervenors moved to intervene shortly after the proposed settlement was
 20 publicly filed and it was revealed that Claimants’ private arbitration proceedings could
 21 potentially be enjoined and they would have to undergo a burdensome opt-out procedure.
 22 Intervenors also learned that the relief afforded under the Settlement does not encompass what
 23 they seek in private arbitration. The motion to intervene was filed promptly on September 26,
 24 2024, only fourteen days after the settlement became public, well within the time frame allowed
 25 for intervention (with no undue delay) and prior to any related hearings or issuance of notice to
 26 the putative class. It is important to remember the “*most important circumstance* relating to
 27 timeliness is that the [proposed intervenors] sought to intervene as soon as it became clear that

1 [their] interests would no longer be protected by the parties in this case.” *Cameron v. EMW*
 2 *Women’s Surgical Ctr., P.S.C.*, 595 U.S. 267, 279-80, 142 S. Ct. 1002, 212 L.Ed.2d 114 (2022)
 3 (cleaned up and emphasis added). That “most important” consideration strongly weighs in favor
 4 of intervention here.

5 The second factor asks whether intervention will prejudice the existing parties. Prejudice
 6 occurs when intervention would expose a negotiated settlement to contrary authority, delay the
 7 relief being sought, or compromise settlements reached after extensive negotiations. *Glass*, 2007
 8 WL 474936, at *4-5; *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978). *Day v.*
 9 *Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (although the State of Hawaii could have sought
 10 intervention at any time during two years of proceedings, its motion did not cause prejudice to
 11 plaintiffs). However, when potential intervenors act as soon as they have notice that a proposed
 12 settlement may be contrary to their interests, as Intervenors did here, courts generally find no
 13 prejudice. *Carpenter v. County of Elko*, 298 F.3d 1122, 1125 (9th Cir. 2002) (“[T]he intervenors
 14 acted promptly after they had notice that the government may not have adequately represented
 15 their interests in negotiating the settlement[.]”); *Day*, 505 F.3d at 965 (“A would-be intervenor’s
 16 delay in joining the proceedings is excusable when the intervenor does not know or have reason
 17 to know that his interests might be adversely affected by the outcome of litigation.”).

19 Here, there is no prejudice to the existing parties because the Intervenors acted as soon as
 20 they had notice to promptly protect their rights. Conversely, the proposed settlement—if
 21 approved without intervention—threatens to extinguish Intervenors and Claimants’ ability to
 22 continue pursuing their arbitrations where they seek relief not encompassed by the proposed
 23 settlement. The proposed settlement purports to resolve claims on behalf of *all* affected users.
 24 ECF No. 103-1, p. 8. But the proposed class settlement places an undue burden on the Intervenors
 25 and Claimants, effectively barring them from pursuing their individual arbitrations as required
 26 under 23andMe’s Terms of Service and, by extension, prevents them from seeking relief that
 27 they could not obtain if they simply participated in the class settlement as an absent class member.

Intervention will not delay or disrupt the current settlement proceedings. Intervenors do not seek to derail the MDL settlement for those who wish to participate in it. Rather, they seek to ensure their interests in arbitration and, by extension, the relief they seek in arbitration, are fully represented and protected if their claims are encompassed by the proposed settlement. Therefore, allowing intervention will not unduly prejudice the existing parties or cause significant delays.

The third factor—the reason for and length of any delay—also indicates in favor of timeliness. As discussed above, this motion was filed shortly after the settlement terms were made public on September 12, 2024. The Intervenors acted promptly, filing this motion within two weeks of learning about the class settlement and its terms. There was no undue delay in bringing this Motion and the Intervenors have moved swiftly to protect their interests.

Courts acknowledge that, when settlement negotiations have been conducted confidentially, potential intervenors lack notice that their interests are unprotected until the settlement terms are disclosed. *E.g., Carpenter*, 298 F.3d at 1125 (“[T]he mediation proceedings had been conducted under an order of confidentiality and the settlement negotiations were not conducted in open court. By entering into confidential settlement discussions, the government does not give notice that it may not be adequately representing the interests of any group of citizens.”). Here, the Intervenors obviously could not take any action until the terms of the proposed settlement were publicly filed and they did so within two weeks of that filing. The Intervenors have therefore moved to intervene at the earliest possible moment.

In sum, this Motion is timely under the standards established by the Ninth Circuit. The proposed Intervenors acted promptly after the terms of the proposed class settlement became public, and their intervention will not prejudice the existing parties or disrupt the settlement process. Therefore, the timeliness requirement for intervention is satisfied.

2. The Proposed Intervenors Have the Requisite Interest in the Subject Matter of This Case

1 The Intervenors have a significant and legally protectable interest in the subject matter of
 2 this case. Under Rule 24(a)(2), intervention must be allowed upon demonstration of an interest
 3 in the underlying litigation that is “significantly protectable” and directly affected by the outcome
 4 of the case. A party has a sufficient interest for intervention purposes if it will suffer a practical
 5 impairment of its interests as a result of the pending litigation. *California ex rel. Lockyer v.*
 6 *United States*, 450 F.3d 436, 441 (9th Cir. 2006).

7 “An applicant has a ‘significant protectable interest’ in an action if (1) it asserts an interest
 8 that is protected under some law, and (2) there is a ‘relationship’ between its legally protected
 9 interest and the plaintiff’s claims.” *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441
 10 (9th Cir. 2006). Here, the arbitration claimant’s rights are directly protected under privacy and
 11 contract laws, as they seek specific relief for the exposure of their sensitive genetic data. These
 12 claimants have a direct and substantial interest in ensuring that the proposed class settlement does
 13 not hinder their ability to pursue the specific remedies they are entitled to under arbitration.

14 Here, Intervenors and Claimants have a direct and substantial interest in ensuring the
 15 proposed class settlement does not extinguish their ability to pursue their pending individual
 16 arbitrations before JAMS or to seek the specific relief discussed above through arbitration. If the
 17 class settlement is approved in its current form, Paragraph 73(h) will prevent *all* class members—
 18 including Intervenors and Claimants—from filing or continuing arbitration proceedings unless
 19 they individually comply with a cumbersome opt out procedure within a narrow timeframe. This
 20 provision directly threatens Intervenors’ and Claimants’ ongoing claims and right to pursue
 21 arbitration and, by extension, the ability to obtain both monetary and non-monetary relief they
 22 could otherwise not obtain if they simply participated as an absent class member in the proposed
 23 settlement.

24 Courts consistently determine Rule 24(a)(2) should be broadly construed in favor of
 25 intervention. *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002). To intervene
 26 as of right, the proposed intervenors must show they have a protectable interest that may be
 27

1 impaired by the litigation. In *Smith v. Los Angeles Unified Sch. Dist.*, the court recognized that
 2 denying intervention could impair the ability of a sub-class to safeguard their interest, particularly
 3 where their rights were threatened by the policies and agreements formed within the class action
 4 framework. *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 863 (9th Cir. 2016) (holding
 5 that denying intervention would impair a subclass' ability to protect its interest, particularly
 6 where the class action framework threatened the rights of the subclass to challenge district-wide
 7 policies)). Similarly, here, the proposed settlement's injunction threatens the arbitration
 8 claimants' ability to obtain they could otherwise not obtain if they simply participated as an
 9 absent class member in the proposed settlement.

10 In sum, the Intervenors identify a unique, protectable interest in pursuing arbitration
 11 which will be impaired if the proposed class settlement is approved in their absence. By enjoining
 12 all arbitrations, the settlement risks leaving Intervenors and Claimants without the opportunity to
 13 proceed with their respective arbitrations or obtain the specific relief they seek. This substantial
 14 impairment justifies intervention as a matter of right under Rule 24.

15

16 **3. Disposition of the Case Will, as a Practical Matter, Substantially
 17 Impair or Impede Proposed Intervenors' Interests.**

18 A proposed intervenor's interests are impaired "[i]f an absentee would be substantially
 19 affected in a practical sense by the determination made in an action." *Southwest Ctr. for
 20 Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (citing advisory committee's
 21 notes). The proposed class settlement substantially affects the Intervenors' interests because it
 22 threatens to extinguish their private contractual rights, including the ability to pursue their
 23 pending arbitrations and the different monetary and non-monetary relief sought through
 24 arbitration.

25 Intervenors and Claimants have already initiated arbitration proceedings against
 26 23andMe (spending hundreds of thousands of dollars in the process), seeking relief they could
 27 otherwise not obtain if they simply participated as an absent class member in the proposed
 28

1 settlement. Significant time and money has been spent preparing, filing, and pursuing their
2 demands in arbitration. Claimants believe they stand to recover far more monetarily through
3 private arbitration than by participating as absent class members in the proposed settlement
4 before the Court. Moreover, the non-monetary relief they seek is different than what they could
5 obtain if they simply participated as an absent class member. For example, the arbitration
6 demands the implementation of logging and monitoring programs, which are essential for real-
7 time oversight of data security and detection of potential future breaches. Furthermore, the
8 arbitration calls for a third-party assessor to conduct SOC 2 Type 2 assessments on an annual
9 basis to independently evaluate 23andMe's compliance with the terms of any award.

10 Intervenors and Claimants cannot obtain the relief they seek through the proposed class
11 settlement. Plaintiff's Proposed Settlement, ECF No. 103-2, ¶¶ 70-72. Even though it includes
12 measures such as multi-factor authentication, annual audits, and password protection, these
13 measures (while positive) are different than the measures Claimants and Intervenors intend to
14 pursue at arbitration, including, for example, SOC 2 Type 2 assessments, which the arbitration
15 claimants believe are critical for ensuring 23andMe maintains robust data protection protocols
16 over time. Additionally, Intervenors and Claimants intend to seek ongoing third-party validation
17 of data deletion and secure handling of genetic information. Intervenors and Claimants cannot
18 obtain this relief if they participate as absent class members in the proposed settlement.

19 If the proposed class settlement is approved in its current form, it would have far reaching
20 implications. Essentially, Parties could strip away private contractual rights when they no longer
21 suit them under the guise of the All Writs Act by way of an injunction that prevents class
22 members, including Intervenors and Claimants, from pursuing their ongoing private arbitration
23 proceedings unless and until they jump through various hoops such as the onerous opt-out
24 procedures set forth in the Settlement Agreement. Settlement Agreement, Paragraph, ¶ 73(h).
25 This provision directly threatens Intervenors and Claimants' ability to obtain the different
26 monetary and non-monetary relief they seek.

1 The opt-out process is not straightforward and imposes unnecessary burdens on class
 2 members, particularly the nearly 5,000 arbitration claimants. It requires claimants to submit a
 3 variety of detailed personal information—including current and past email addresses, 23andMe
 4 account details, and a signed attestation—all within a narrow timeframe. Even after class
 5 members opt out, they have to then verify their opt-out, essentially requiring class members to
 6 opt out of the settlement twice. These stringent requirements, combined with the demand for a
 7 personal signature, create significant obstacles, making it difficult for claimants to opt out.

8 This process seems tailored to suppress the impact and voice of the arbitration claimants
 9 by making it impractical for many to meet the complex and time-sensitive requirements. The
 10 burdensome opt-out process increases the likelihood that many will inadvertently lose their right
 11 to pursue arbitration, including a greater monetary recovery and different non-monetary relief
 12 than that which is provided for under the proposed settlement.

13 In sum, the proposed class settlement seeks to completely bar Intervenors' pending
 14 arbitrations and prevent them from pursuing relief that is different than what they would obtain
 15 if they simply participated as an absent class member. The potential loss of their right to pursue
 16 an ongoing arbitration, along with the opportunity to obtain different relief that Intervenors
 17 believe will directly address the exposure of their sensitive genetic data, constitutes a significant
 18 impairment of their protectable interests. As such, the approval of the class settlement, without
 19 intervention, may substantially impair or impede the Intervenors' ability to safeguard their rights.
 20 This unquestionable risk to their interests makes intervention necessary under Rule 24(a)(2).

21 **4. Proposed Intervenors Are Inadequately Represented by Existing
 22 Parties**

23 To determine whether representation is adequate, courts consider: (1) whether a party
 24 before the court will make the same arguments the prospective intervenor would; (2) whether the
 25 present party is capable and willing to make those same arguments; and (3) whether the
 26 intervenor would offer necessary elements to the proceedings that other parties would neglect.

California v. Tahoe Reg'l Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986). Although the burden is on the proposed intervenors to show that representation is inadequate, this burden is minimal and may be satisfied by a showing that representation of their interests by parties presently before the court “may be” inadequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.2003). The Intervenors focus on preserving their right to continue their respective arbitration proceedings and to seek specific, different relief through arbitration, as opposed to that which is being offered by the class settlement. The Intervenors and Claimants already initiated arbitration proceedings and submitted their arbitration demands to JAMS months before the class settlement was presented to the Court. Their primary interest lies in ensuring they have an unimpaired opportunity to continue pursuing their arbitrations and seek the relief to which they believe they are entitled under the circumstances. At bottom, Intervenors and Claimants simply cannot obtain the relief they seek through the proposed class settlement. The Intervenors’ interests are therefore unlikely to be fully represented by the class representatives who are seeking different relief (both monetary and non-monetary) in the class proceedings. Moreover, the proposed settlement extinguishes for all class members, including the Intervenors, all rights to seek or to continue arbitration unless they strictly comply with an opt-out process that is clearly designed to discourage participation and prevent opting out. By requiring detailed personal information, multiple account details, and personal signature within a narrow timeframe, the process imposes unnecessary hurdles. These complex requirements make it difficult for claimants to opt out, effectively depriving them of their contractual right to arbitrate and steering them into a proposed settlement that affords different relief than what they would seek through arbitration. This provision directly conflicts with the Intervenors’ interests, as they seek to continue their arbitrations in pursuit of different relief afforded under the proposed class settlement. The tension between the different relief sought by the MDL class representatives and the Intervenors demonstrates why the Intervenors’ interests are not adequately represented by the existing MDL parties.

1 The Intervenors' distinct interests in obtaining different relief through arbitration cannot
2 be adequately represented by the MDL class, justifying intervention under Rule 24(a)(2).

3 **B. Alternatively, Proposed Intervenors Should Be Entitled to Permissive Intervention**

4 Even if the Court finds that intervention as of right is not warranted, the proposed
5 Intervenors should be granted permissive intervention under Rule 24(b). Permissive intervention
6 is appropriate when the applicant's claim shares a common question of law or fact with the main
7 action and will not unduly delay or prejudice the adjudication of the original parties' rights. *Id.*
8 Here, both the class members and Intervenors seek relief for 23andMe's failure to protect
9 sensitive personal and genetic information, making the legal and factual issues common. Courts
10 regularly allow permissive intervention when the intervenor provides a unique perspective not
11 fully represented by existing parties. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326,
12 1329 (9th Cir. 1977). The Intervenors' concerns regarding the continued pursuit of individual
13 arbitrations and the long-term risks of genetic data exposure, including potential misuse and
14 discrimination, offer a valuable perspective that complements the class action and may not
15 otherwise be presented to the Court.

16 Permissive intervention will not cause undue delay or prejudice. The Intervenors seek
17 only to protect their right to pursue individualized relief through arbitration, without derailing
18 the settlement for other class members. Their intervention ensures their distinct interests are
19 safeguarded, particularly when they seek different relief than that which is afforded under the
20 proposed class settlement.

21 Permissive intervention should be granted as the Intervenors provide necessary elements
22 to the proceedings without impeding the overall settlement.

23 **CONCLUSION**

24 The Intervenors have a protectable interest in the subject matter of this case and meet the
25 four elements for intervention as of right under Rule 24(a): the motion is timely, they have a
26

1 direct interest in the case, that interest would be impaired if intervention is denied, and the
2 existing parties do not adequately represent their interests.

3 For these reasons, the Court should grant the Intervenors' motion to intervene and grant
4 them leave to file the Opposition to Proposed Injunction and Opt-Out Procedures Sought by
5 Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, attached hereto as
6 Exhibit A. A Proposed Order granting this Motion is attached hereto as Exhibit B.

1 Dated: October 1, 2024.

Respectfully submitted,

2 /s/ *Alex R. Straus*

3 Alex R. Straus (SBN 321366)
4 **MILBERG COLEMAN BRYSON**
5 **PHILLIPS GROSSMAN, PLLC**
6 280 S. Beverly Drive, Penthouse
Beverly Hills, CA 90210
(919) 600-5000
astraus@milberg.com

7 *Attorney for Proposed Intervenors Vivian Gonczi,
Howard Packer, and Lance Alligood*

CERTIFICATE OF SERVICE

I, Alex R. Straus, an attorney, hereby certify that on October 1, 2024, I caused a true and correct copy of the foregoing document to be filed and served electronically via the Court's CM/ECF system.

/s/ Alex R. Straus

Alex R. Straus